

HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

In the Matters of)	D.R. NO. 02-0015
)	
HCRC NO. 9951; EEOC NO. 37B-)	FINAL DECISION AND ORDER
A0-0061)	GRANTING PETITION FOR
HCRC NO. 9952; EEOC NO. 37B-)	DECLARATORY RELIEF
A0-0062)	
HCRC NO. 9953; EEOC NO. 37B-)	
A0-0063)	
HCRC NO. 9954; EEOC NO. 37B-)	
A0-0064)	
HCRC NO. 9955; EEOC NO. 37B-)	
A0-0065)	
)	

FINAL DECISION AND ORDER GRANTING PETITION FOR DECLARATORY RELIEF

I. INTRODUCTION

On May 15, 2002, the Executive Director filed a Petition for Declaratory Relief ("Petition") seeking a declaration that when an individual is subject to an adverse employment action because of the employer's stereotyped views of how a man or woman should look or behave that individual is subjected to discrimination on the basis of sex. Petition, at 1. The Petition also seeks a declaration that employment discrimination because an individual is transgender or transsexual is discrimination because of sex. Id. Essentially, the Executive Director seeks a declaration to determine whether there is jurisdiction to investigate complaints of sex discrimination in these situations.

On June 3, 2002, a Memorandum in Opposition (" Memo Op.")

was filed on behalf of the unnamed Respondents¹ to the complaints listed in the caption. On June 28, 2002, the Commission heard oral argument from the parties.

II. TRANSGENDER INDIVIDUALS AND TRANSSEXUALS

According to the Petition, the term "transgender" includes any person who moves or wishes to move across the gender line of their assigned birth sex. It includes persons who identify with and choose to live as the opposite gender (with or without undergoing surgery), pre-, post-, and non-operative transsexuals; intersexed persons (having biological characteristics of more than one sex); persons who are born with ambiguous genitalia or chromosomal ambiguity; full or part-time cross dressers; and other individuals who transgress societal norms and expectations of sex and gender. Petition at 6-7.

The term "transsexual" describes a transgendered individual who is mentally of one sex but physically of the other, or a person born with the anatomical genitalia of one sex but whose self-identity is of the other sex. Petition, at 7. Transsexuals' inner sexual identity is in conflict with their

¹The names of the complainants and respondents and certain factual matters were redacted from the Petition. See, Order Granting Petition for Declaratory Relief, D.R. 92-003 (June 9, 1993). The Memo Op. has also been redacted.

gender identity. Id. Transsexuals have a strong and persistent desire to live or be treated as the other sex. Id.

Respondents define transgendered individual as "anatomically their birth gender but are not seeking to undergo sexual reassignment surgery and may simply identify either in whole or in part with the other gender." Memo Op., at 4. Respondents define transsexuals as "those who are in the process of, or who have undergone sexual reassignment surgery." Id. "Once they do so, they are in the eyes of the law, their new gender." Id., (comma omitted.) Thus, Respondents acknowledge that transsexuals are entitled to be treated under the law as the opposite gender after they have undergone sexual reassignment surgery.

The alleged claim of discrimination underlying the complaints listed in the caption is that male-to-female transsexuals and transgendered individuals, who wear women's clothing or exhibit typically "feminine" behavior or characteristics at work, have been subjected to adverse actions in employment by respondents. Petition, at 6; Affidavit of April Wilson-South, ¶ 8, attached to Petition. The Commission hereby finds that the Petition is being filed on behalf of male-to-female transsexuals or transgendered individuals who wear women's clothing or exhibit typically "feminine" behavior or characteristics at work.

III. JURISDICTION TO INVESTIGATE COMPLAINTS OF SEX DISCRIMINATION

A. HAWAI`I'S STRONG PUBLIC POLICY AGAINST SEX DISCRIMINATION

Our Constitution and laws prohibit discriminatory treatment on the basis of sex. The Hawai`i Constitution, Art. I, § 5, provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

(Emphasis added.) The Hawai`i Constitution also has an Equal Rights Amendment ("ERA"), Art. I, § 3, which provides:

Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section.

The Hawai`i Supreme Court has held that based upon the Hawai`i ERA, sex is a "suspect category" for purposes of equal protection analysis in Art. I, § 5, Hawai`i Const., and that sex-based classifications are subject to the strict scrutiny test. Baehr v. Lewin, 74 Haw. 30, 80, 852 P.2d 44, 67 (1993). These constitutional provisions demonstrate the strong aversion that our citizens have against all forms of sex discrimination.²

²Hawai`ian culture has had a history of tolerance for physical and psychological ambiguities inherent in sex. In Hawaii legend and tradition, physically intersexed persons, known as "mahu," were respected men; talented priests of healing and the hula. Mary Kawena Pukui, et al., Na Na Ke Kumu (Look to the Source) at 110 (1972). Hawaiians accepted matter-of-factly the occasional crossing of prescribed gender roles by the different sexes. Samuel M. Kamakau, Ruling Chiefs of Hawaii, at 238 (1961).

The United States Constitution does not contain similar provisions against sex discrimination. So federal court interpretations are not necessarily controlling; and Hawai'i laws must be interpreted with this distinction in mind.

The Legislature has also enacted strong civil rights laws to prohibit discrimination on the basis of sex. HRS § 368-1 provides, in part:

The legislature finds and declares that the practice of discrimination because of ... sex ... in employment, ... is against public policy.

HRS § 378-2(1)(A) provides, in part:

It shall be an unlawful discriminatory practice [b]ecause of ... sex ... [f]or any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment[.]

In 1991, the employment discrimination law was amended to add sexual orientation as a protected basis; and Hawai'i is one of the few states which prohibits such discrimination.

The Hawai'i Supreme Court has stated that "Hawai'i's Employment Discrimination Law [] was enacted to enforce the constitutional prohibition against sex discrimination in the exercise of a person's civil rights in the employment arena." Sam Teague, Ltd. v. Hawai'i Civil Rights Commission, 89 Hawai'i 269, 277, 971 P.2d 1104, 1112 (1999)(brackets added.) It has further ruled that the employment discrimination law is a remedial statute that must be liberally construed to accomplish

its purpose. See, Furukawa v. Honolulu Zoological Society, 85 Hawai'i 7, 17, 936 P.2d 643, 653 (1998). Thus, all forms of discrimination in employment because of sex are against public policy, and the law must be liberally construed to prevent such discrimination.

HRS § 378-1, which contains definitions related to employment discrimination, provides:

Because of sex shall include, but is not limited to, because of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as any other individuals not so affected but similar in their ability or inability to work.

(Emphasis added.) The definition does not mention "men", nor does it contain any mention of "transsexuals" or "transgendered individuals." Women are only mentioned with respect to "pregnancy, childbirth and related medical conditions." But, despite the lack of any reference to "men" and the limited reference to women, it is clear that both men and women are protected from all forms of sex discrimination in employment. Thus, the failure to mention transsexuals or transgendered individuals in the definition does not necessarily preclude their inclusion in the prohibition against sex discrimination under a liberal construction of the statute. Furukawa v. Honolulu Zoological Society, supra.

B. SCOPE OF THE PETITION

The Petition seeks a declaration that "transgendered individuals" and "transsexuals" are protected from sex discrimination. The Executive Director seeks to exercise jurisdiction over sex discrimination complaints filed by transgendered individuals and transsexuals.

Respondents claim that administrative rule, HAR § 12-46-181, which excludes from the definition of "disability," "transvestitism, transsexuals, pedophilia ... gender identity disorders not resulting from physical impairments, other sexual behavior disorders ..." means that transsexuals are not protected from sex discrimination in employment. This argument is illogical because it ignores the fact that the cited rule only governs disability discrimination. There are separate rules governing sex discrimination, HAR §§ 12-46-101 to 109; and these rules do not exclude transsexuals from coverage. Therefore, the Commission is not precluded from deciding whether transgendered individuals and transsexuals are entitled to protection from sex discrimination.

C. THE SEX OF TRANSGENDER INDIVIDUALS AND TRANSSEXUALS MAY BE IMPLICATED IF EMPLOYMENT ACTIONS ARE TAKEN ON THE BASIS OF THEIR STATUS AND SEXUAL STEREOTYPING OF SUCH INDIVIDUALS MAY ALSO CONSTITUTE SEX DISCRIMINATION

The Commission recognizes that under Hawai'i Supreme Court precedent the concepts of "sex" and "gender" have been treated interchangeably. See, State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990)(use of peremptory challenges to exclude women on the

basis of their gender constitutes sex discrimination under Art. I, § 5, Hawai'i Const.) Under United States Supreme Court precedent, "sex" and "gender" have also been used interchangeably. See, Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989). If transgender individuals and transsexuals are subjected to discrimination because they are transgender or transsexual, such discrimination may constitute sex discrimination.

In Price-Waterhouse v. Hopkins, supra, the United States Supreme Court also held that federal employment discrimination law was violated when a female employee was denied partnership in an accounting firm because she did not conform to social and cultural expectations ascribed to her sex. In other words, sexual stereotyping is a form of sex discrimination when an individual is subjected to discriminatory treatment because he or she does not act in accordance with stereotypes of how men or women should act. The Hawai'i Constitution and laws clearly support strong protections against discriminatory treatment on the basis of sex. A fair and equal opportunity to work is an important civil right. Because the employment discrimination law is a remedial statute which must be liberally construed to prevent sex discrimination, the Executive Director is authorized to investigate complaints of sex discrimination filed by transgendered individuals and transsexuals and make a determination whether reasonable cause exists to believe that an unlawful discriminatory practice has occurred. HRS § 368-13(b).

The Commission will decide on a case by case basis after a contested case hearing whether the alleged discriminatory conduct constitutes sex discrimination.

The Commission notes that it issued a declaratory ruling that "sex differentiated hair length standards do not, per se, constitute discrimination based upon sex." DR 92-003 (June 9, 1992). But the matter of sex stereotyping was not raised; and the case did not involve transgender individuals or transsexuals dressing or exhibiting behavior typical of the opposite sex.

III. ORDER

IT IS HEREBY ORDERED that the Petition for Declaratory Relief is granted under HAR § 12-46-72. The Executive Director has jurisdiction to investigate all claims of sex discrimination filed by transgendered individuals and transsexuals to determine if sexual stereotyping or other forms of sex discrimination have occurred.

An aggrieved party may seek reconsideration under HAR § 12-46-38 by filing a motion with ten days of receipt of this order. An aggrieved party may seek judicial review in the circuit court under HRS §§ 91-8 and 14 within thirty days after service of the final decision and order.

DATED: Honolulu, Hawaii. June 28, 2002.

HARRY YEE
Chair

JACK LAW
Commissioner

FAYE KENNEDY
Commissioner

ALLICYN HIKIDA TASAKA
Commissioner

JUNE MOTOKAWA
Commissioner